FILE COPY.

Office Supreme Court
FILED
AUG 26 19
JAMES H. McKENNEY

No. 814. 51

IN THE

Supreme Court of the United States,

FRED RASMUSSEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

W. E. CREWS,
Attorney for Plaintiff in Error.

R. W. Jennings
Of Counsel.

No. 314.

IN THE

Supreme Court of the United States,

FRED RASMUSSEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

W. E. CREWS,

Attorney for Plaintiff in Error.

Section 171, page 179 Carter's Annotated Alaska Codes, in speaking of the formation of juries, among other things, provides as follows:—

"The jury shall consist of 12 persons unless the parties consent to a less number. Such consent shall be entered in the journal: **provided, that hereafter in trials for misdemeanors 6 persons shall constitute a legal jury**

This section was taken verbatim from the Oregon Code, with the proviso added.

Under the authority of the above section of the Alaska Code, the defendant being on trial charged by an indictment

with the commission of a crime was compelled (over his objection, record page 7) to go to trial before a jury of 6 men. And his demand for a constitutional jury of 12 men was denied, and from his conviction, sentence and judgment this writ is prosecuted.

Plaintiff in Error relies chiefly upon his first assignment of error, towit:—

"The court erred in compelling Plaintiff in Error, over his protest and objection, to be tried by a jury of 6 men instead of a jury of 12 men."

The contention is that that portion of the section 171 of Alaska Code authorizing a trial in criminal cases by a jury of 6 persons is void, because it deprives a person, of the right of trial by a jury of 12 competent, impartial men as guaranteed to every citizen by the provisions of the constitution.

We contend that Congress has no power under the constitution to pass an act authorizing a trial in a criminal case by a jury of less than 12 men.

The terms "jury" and "trial by jury" are and always have been well known in the language of the law. They were used at the adoption of the constitution, and always it is believed before that time; and almost since in a single sense.

The jury for the trial of a cause was a body of 12 men described as upright, well qualified and lawful men disinterested and impartial and not of kin, etc., etc.

* * * * * * * * * * *

All the books of the law describe a "trial jury" substan-

tially as we have stated it, and a "trial by jury" is a trial by such a body so constituted and conducted.

So far as our knowledge extends these expressions were used at the adoption of the constitution, and always have been used in these senses alone by all classes of writers and speakers.

The whole current and drift of authority in the United States are, without exception, to the same effect.

We cite but few authorities, although they could be furnished without limit.

Cooley's Constitutional Limitations 391

1 Bishop Crim. Procedure, Sec. 764, 768, 773, 774 779, 781.

Flint River Steamboat Co. vs. Foster, 5 Georgia 195

Stoppe vs. the Commonwealth, 74 Penna. St 458

Wharton's Law Dict., Title "Challenge" U. S. Crim. Law (Lewis) 611.

Worke vs. The State, 2 Ohio St. 277

People vs. Bodine, 1 Denio 304

Freeman vs. The People, 4 Denio 34

Wyheimer vs. The People, 15 N. Y. 424

Cancemei vs. The People, 16 N. Y. 504

People vs. Williams, 6 Calif. 207

Cooley vs. The St. of Texas, 38 Texas 637

Ingersoll vs. Wilson, 2 W. Virginia 59

Thompson vs. the St. of Utah, 107 U. S. 343

St. of Nevada vs. McClare, II Nev. ..... pp. 42—60

The decisions in all the foregoing cases were delivered without a single dissenting opinion; and we have been unable to find a case in America holding a contrary doctrine; and we are satisfied that none can be found.

To further illustrate our views of the law, and to support our contention that Congress is prohibited by the constitution from passing such an act, we beg the indulgence of the court to quote at length from the decision of the Hon. Justice Harlan in a recent case decided in this court, being the case of Thompson vs. The State of Utah, wherein the learned Judge holds as follows:—

"The constitution of the United States provides: 'The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may have by law directed.' Cons. U. S. art. 3, *2. And by the sixth amendment of the constitution it is declared: 'In **all** criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and **district** wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.'

"That the provisions of the constitution of the United States relating to the right of the trial by jury in suits at common law apply to the territories of the United States is no longer an open question. Webster vs. Reid, II How. 437, 460; Publishing Co. vs. Fisher, 166 U. S. 464, 458, 17 Sup. Ct. Springville City vs. Thomas, 166 U. S. 707, 17 Sup. Ct. 717. In the last named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the territory of September 9, 1850 (9 Stat. 453 c. 51, *6), to provide that the unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: 'In our opinion, the seventh amendment secured unanimity in finding a verdict as an essential of feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.'

"It is equally beyond question that the provisions of the national constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States.

"The judgment of this court in Reynolds vs. U. S., 98 U. S. 145, 154,—which was a criminal prosecution in the territory of Utah,—assumed that the sixth amendment applied to criminal prosecutions in that territory.

"In Callan vs. Wilson, 127 U. S. 540, 548, 551, 8 Sup. Ct. 1301, which was a criminal prosecution by information in the police court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the third article of the constitution as well as by the fifth and sixth amendments. The contention of the govern

ment was that the constitution did not secure the right of trial by jury to the people of the District of Columbia; that the original provision, that when a crime was not committed within any state "the trial shall be at such place or places as the Congress may by law have directed," had probably, reference only to offences committed on the high seas; that in adopting the sixth amendment the people of the states were solicitous about trial by jury in the states, and no where else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be hereafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dock yards; and, consequently, that that amendment should be deemed to have superseded so much of the third article of the constitution as related to the trial of crimes by jury. That contention was overruled, this Court saying: 'As the guarantee of a trial by jury, in the third article, implied a trial in that mode, and according to the settled rules of the common law, the enumeration, in the sixth amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundmental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well as those permanently or temporarily residing in the District of Columbia as those residing or being in the several states. There is nothing in the history of the constitution or of the original amendments to justify the assertion

that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty and property; especially of the privilege of trial by jury in criminal cases.' 'We cannot think,' the court further said, 'that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States.'

"In Late Corporation of the Church of Jesus Christ of the Latter day Saints vs.U.S.136. US.I, 44,10 Sup.Ct.792,one of the questions considered was the extent of the authority which the United States might exercise over the territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court, in one of which--National Bank vs. County of Yankton, 101 U. S. 129, 133—it was said that Congress, in virtue of the sovereignty of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the territorial legislature valid, and a valid act void; that it had full and complete legislative authority over the people of the territories and all the departments of the territorial governments; that it "may do for the territories what the people, under the constitution of the United States, may do for the states." Reference was also made to Murphy vs. Ramsey, 114 U. S. 15, 44, 5 Sup. Ct. 747, in which it was said: 'The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restric-

tions as are expressed in the constitution, or are necessarily implied in its terms.' The opinion of the court in Late Corporation of the Church of Jesus of Latter-day Saints vs. U. S. then proceeded: 'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the constitution, from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the territories and over the acts of the territorial legislature established therein is generally expressly reserved in the organic acts establishing government in said territories. This is true of the territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved Sept. 9, 1850, it is declared 'that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act. * * * * All laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. 454.

"Assuming, then, that the provisions of the constitution relating to trial for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale, P. C. 161; I Chit. Cr. Law, 505. This question must be answered in the affirmative. When Magna Charta de-

clared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by 12 persons. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power' 2 Story, Const. *1779. In Bac. Abr. title "juries," it is said: 'The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellences of our constitution; for what greater security can any person have in his life, liberty or estate than to be sure of not being divested of nor injured in any of these without the sense and verdict of 12 honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale, P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of 12 men all concurring in the same judgment, by the testimony of witnesses viva voce in the presence of the judge and jury, and by the inspection and direction of the judge.' It must consequently be taken that the word "jury" and the words "trial by jury," were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation —the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a territory.

Such is the condition in Alaska.

"Was it, then, competent for the State of Utah, upon its admission into the Union, to do, in respect of Thompson's crime, what the United States could not have done while Utah was a territory, namely, to provide for his trial by a jury of eight persons?

"We are of the opinion that the state did not acquire, upon its admission into the Union, the power to provide, in respect of felonies committed within its limits while it was a territory, that they should be tried otherwise than by a jury such as is provided by the constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors would recognize the power of the state not only to do what the United States, in respect of Thompson's crime, could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed."

It cannot be said that such an act can be sustained on the theory that it is a police regulation; for, as such, it would be equally obnoxious. The only theory upon which such legislation by Town Councils and other inferior and limited tribunals, have been sustained is that, upon an appeal from such tribunals, the defendant would be entitled to a trial by a constitutional jury. Such contention would not meet the situation in Alaska.

That the citizens of Alaska are guaranteed the constitutional right of a trial by jury certainly cannot be questioned. We are under the direct and complete jurisdiction of the United States. Our courts are clothed with the power and jurisdiction of Circuit and District Courts of the United States.

SEC. 367, PAGE 432 OF OUR CODE provides that so much of the common law as is applicable and not inconsistent with the Constitution of the United States, or with any law passed by Congress, is adopted and declared to be law within the District of Alaska.

ARTICLE 3 OF THE TREATY OF CESSION between the United States and Russia provides that "the inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

To say that the citizens of Alaska do not enjoy the constitutional guarantees, but are left to the arbitrary will of a legislative body composed of members in the choice of which they have no voice, to be dealt with according to that

miserable, lame and imperfect compilation of laws 'know as the "Carter's Annotated Alaska Codes" would be to increase the absurdity of the position of our general government towards its dependencies to an intolerable degree.

As to our third assignment or error, and the only other assignment of error that we shall consider:

It seems to us that a simple statement of the proposition fully and sufficiently reveals the error of the trial court.

Section 127 of the Alaska Codes (being the section for the violation of which the defendant was on trial) provides "that if any person shall keep and set up a house of ill fame, etc., * * * * * shall be punished, etc., * * * * * * *"

It is very clear from the reading of the section that the only person that can be guilty of this offense is the person who sets up the place; and that the employes and help about the place could not be charged with the offense. And yet the Court in its instructions to the jury practically instructed them "that all persons who aided, or was in any way connected, or had anything to do with such place could be found guilty under the indictment of setting up and keeping."

Such instruction, we contend, was clearly erroneous; and did, in fact, injuriously affect the defendant on trial. As it was clearly shown that he was not the licensee, but was only an employee of the house, we respectfully submit that this cause should be reversed, and the new trial be granted.

W. E. CREWS,

Attorney for Plaintiff in Error.

A. W. Gunning.

Of Counsel.